No. 11889

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. T. POTTER, et al.,
Appellants,

v.

KAISER COMPANY, INC., a corporation, and UNITED STATES OF AMERICA,
Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

APPELLANTS' BRIEF

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Jurisdiction

This is a civil action by employees to collect unpaid overtime compensation pursuant to the Fair Labor Standards Act of 1938, (52 Stat. 1060; 29 U.S.C.A., sec. 201) all as alleged by the amended complaint herein. (Tr. 4) The Court below had jurisdiction under Section

16 (b) of that Act and under Section 24 (8) of the Judicial Code. (28 U.S.C.A., sec. 41 (8)). The case was dismissed for want of jurisdiction in reliance upon the Portal-to-Portal Act of 1947. (61 Stat. 84; 29 U.S.C.A., sec. 251) That Act was pleaded in defense by the defendant Kaiser Company. (Tr. 15, 24)

This appeal is taken pursuant to section 128 of the Judicial Code (28 U.S.C.A., sec. 225) and questions whether the Portal-o-Portal Act is applicable to the facts of this case and, if so, whether that statute is constitutional.

The sections of the Portal-to-Portal Act involved in this case are: Section 2 (a), which absolves employers from liability under the Fair Labor Standards Act for failure to pay overtime compensation or for any activity prior to enactment of the Portal-to-Portal Act unless the same was made compensable either by contract or by custom or practice; Section 2 (c), which provides that only such time shall be regarded as time worked under the Fair Labor Standards Act; and Section 2 (d), which deprives both federal and state courts of jurisdiction over cases involving claims not compensable under Section 2 (a).

STATEMENT OF THE CASE

As stated above, this is an action to recover unpaid overtime compensation pursuant to the Fair Labor

Standards Act of 1938. The original complaint in this case was filed on January 17, 1946. (Tr. 50) On April 3, 1947, an amended complaint was filed, alleging that defendant Kaiser Company is a Nevada corporation and was at that time engaged in the operation of the Swan Island shipyard in Portland, Oregon, where it was engaged in the construction and repair of ships for and in interstate commerce, with materials received in interstate commerce; (Tr. 51, 4, 5) that plaintiffs (whose names are listed in the Transcript, pp. 8-14) were employed as guards in activities necessary to the production of ships for interstate commerce and repair of ships engaged in interstate commerce; (Tr. 5, 6) and that plaintiffs were compelled and required to work certain hours of overtime in excess of forty hours per week for which they received no compensation, as required by the Act. (Tr. 6, 7)

The amended answer of defendant Kaiser Company, filed on June 24, 1947, alleges, among other things, that on May 14, 1947, the Portal-to-Portal Act was enacted; that Section 2 (a) of the Act barred compensation for activities not compensable by contract or by custom or practice; that the activities of plaintiffs were not so compensable and that Section 2 (d) of the Act further removed jurisdiction of the court over the case. (Tr. 52, 15, 24-25)

A reply was filed by plaintiffs, denying these allegations of the answer and, as an affirmative reply, alleging as follows:

> "that said Act does not apply to plaintiffs in this particular case, in that the work involved in this particular case is not portal-to-portal work; that, instead, the overtime asked for in this particular case is for work involving guards who had to stand roll call and inspection, receive orders and then go to their posts; that all of the said activities consumed thirty minutes; that the employees, by written rule of the company were required to be at the roll call and at the guard house thirty minutes before actually going to their posts of duty in the particular sections of the yard; that a guard was under the penalty of being fired or discharged if he did not so report for work at this particular time and stand roll call and inspection and have his assignments made; that all of said work and activities were work within the meaning of the Fair Labor Standards Act; that the Portal-to-Portal Act was not intended at any time to cut off or in any way bar suits of this kind and nature; that time is not asked for in this case from the time men reported on the premises, but, rather, it is asked for the time they were required to report at the guard house under penalty of discharge if they did not do so, and said roll call, inspection and taking of assignments were part of the main activities of guarding said property." (Tr. 28-29)

Plaintiffs' reply also alleged that the causes of action arose prior to the Portal-to-Portal Act and that the Act is unconstitutional as applied to this case in that the Act would violate the due process clause of the Fifth Amendment and would invade the domain of the judiciary in

violation of Article III, Sections 1 and 2. (Tr. 30-32)

The case was set down for trial on the question of jurisdiction and, on June 24, 1947, this question was tried before the Court, sitting without a jury. (Tr. 52) The United States of America was then allowed to intervene for the purpose of defending the constitutionality of the Portal-to-Portal Act. (Tr. 33-37)

The evidence adduced at the trial included written General Instructions issued to all guards, stating that:

> "All members should be prepared to stand roll call thirty minutes prior to relieving the shift on duty." (Tr. 70; Exhibit 31)

The testimony showed that each day all guards were required to have their uniforms on and be ready for roll call thirty minutes in advance of the time they went on patrol duty; (Tr. 58) that the uniforms were owned by the company and were usually left at the guardhouse in lockers provided for that purpose; (Tr. 64) that at the roll call there was an inspection to see that uniforms were in order and clean; (Tr. 59, 64, 70) that orders of the day were then read and the guards were assigned to their posts and given instructions; (Tr. 59) and that the guards then marched in military formation to their various posts (Tr. 59) which ranged in distance from a short distance to nearly a mile. (Tr. 75) It appeared further that men were discharged if they failed to report for roll call thirty minutes in advance of their shift

(Tr. 62) or without full uniform and neatly shaven (Tr. 64) and that the company regarded its guards as being on duty at all times when they were around the yard for the purpose of assisting in handling of any disorders. (Tr. 70) Finally, it appeared that although the guards were not organized and had no written contract of employment (Tr. 87) they were paid on the basis of hourly rates, with time and one-half for work in excess of eight hours in any one day, and forty hours in any week (Tr. 76, 77), but had not been paid for the time spent in the above-described activities. (Tr. 78)

At the conclusion of the testimony defendant moved to dismiss the case and the Court made the following statement on the record:

> "Tinkering with jurisdiction to accomplish a substantive purpose is a very dangerous thing, and some day the lawyers of this country will wake up to that danger and will throw their weight against it. The people who conceived the idea and turned it loose on the American people have no reason to be proud of their creation, in my opinion."
>
> * * *
>
> "But, regardless of how I feel about it, it is my duty to follow authority, and authority in this country has upheld prior legislation where the same principle is involved and, therefore, compels me to sustain the motion to dismiss, and that will be the order, with exception to the plaintiffs." (Tr. 93)

On January 21, 1948, the Court issued a memorandum opinion that the facts of the case were within the Portal-

to-Portal Act; that the Act was constitutional, and that the case would be dismissed for want of jurisdiction. (Tr. 37) On the same date the court filed findings of fact, including a finding as follows:

> "That the plaintiffs were required to report for roll call at the guardhouse 30 minutes prior to relieving the shift on duty; that, during this said 30 minutes, plaintiffs were required to stand roll call, inspection, receive assignments, and to proceed to their posts of duty which were varying distances from the guardhouse; that the said guardhouse was located on the property inside the gate at Swan Island; that the plaintiffs worked 30 minutes per day during the period above mentioned, namely from February 1, 1942, to March 4, 1945, six days a week, without receiving overtime compensation; that the plaintiffs were not only required to report 30 minutes prior to the time on the premises of the employer but were disciplined for failure to do so." (Tr. 39)

The court went on to find that these activities were preliminary or postliminary to the principal activity of plaintiffs in guarding the shipyard; that there was neither contract nor custom requiring payment for these activities and that under Sections 2 (a), (b) and (d) of the Portal-to-Portal Act the Court had no jurisdiction of the case. (Tr. 40-42) Accordingly, the case was dismissed for want of jurisdiction. (Tr. 43-44).

Thereafter, plaintiffs duly perfected their appeal from the judgment of dismissal, (Tr. 44-49) which pre-

sents to this court the question whether the Portal-to-Portal Act is applicable to the facts of this case and, if so, whether that Act is constitutional.

SPECIFICATION OF ERRORS

1. The Court erred in making the following finding of fact:

> "The hours of overtime for which plaintiffs seek compensation by their complaint herein relate to activities which were preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard; and plaintiffs have been paid in full for all services performed by them in the performance of said principal activity." (Tr. 39-40)

Said finding was in error for the reason that the evidence submitted by plaintiffs (Tr. 58-76) and the previous findings made by the Court (Finding of Fact No. 2, Tr. 39), when considered in the light of the provisions, legislative history and intent of the Fair Labor Standards Act and the Portal-to-Portal Act, make it clear that the hours of overtime for which plaintiffs seek compensation in this case were not "preliminary" or "postliminary" to their "principal" activity of guarding said shipyard, but that in this case plaintiffs were required by defendant Kaiser Co. to report for roll call, inspection, assignments of posts and orders thirty minutes in advance of actual patrol duty and that said overtime

hours were indispensable to the guarding of said shipyard and were an integral part of and among the "principal" activities which said plaintiffs were employed to perform and constituted "hours worked" for which plaintiffs have not been paid but for which plaintiffs are entitled to receive overtime compensation under the provisions of the Fair Labor Standards Act and for which plaintiffs are not barred from recovery by the provisions of the Portal-to-Portal Act.

2. The Court erred in making the following finding of fact:

> "The only contract, written or otherwise, between plaintiffs or any of them and defendant, the United States of America, or the United States Maritime Commission with respect to employment at said shipyard was that plaintiffs and each of them would be compensated and paid for the time spent by them in actually guarding said shipyard, as distinguished from any preliminary or postliminary activities in connection therewith. Said contract has been fully performed and plaintiffs and each of them have been fully paid and compensated for the time spent in actually guarding said shipyard; and in fact, none of the plaintiffs contend or assert that such contract has not been fully performed." (Tr. 40)

Said finding was in error for the reason that the hours of overtime for which plaintiffs seek compensation were not "preliminary" or "postliminary" activities, but, as pointed out above, were indispensable to, an integral

part of and among the "principal" activities which plaintiffs were employed to perform and were compensable under plaintiffs' contract of employment, which has not been fully performed in that plaintiffs have not been paid any compensation for such activities.

3. The Court erred in making the following conclusion of law:

> "There was no express provision of a written or non-written contract in effect at the time plaintiffs served as guards at said shipyard, between plaintiffs or their agents or collective bargaining representative and defendant or the United States of America or the United States Maritime Commission pursuant to which the preliminary and postliminary activities referred to above and the time spent in performing the same were compensable, either with respect to straight-time compensation or overtime compensation." (Tr. 41)

The foregoing conclusion of law is in error for the same reasons as stated above with respect to the finding of fact quoted in Specification No. 2.

4. The Court erred in making the following conclusion of law:

> "That under the provisions of Section 2 (d) of the Portal-to-Portal Act of 1947 this Court has no jurisdiction over this action, for the reason that it is an action to enforce liability for or on account of the failure of the alleged employer of plaintiffs to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, with respect to an activity which was not compensable under Sec-

tion 2 (a) or Section 2 (b) of the Portal-to-Portal Act of 1947." (Tr. 42)

The foregoing conclusion of law is in error for the reason that the Portal-to-Portal Act has no application to the facts of this case and that if the Portal-to-Portal Act has application to the facts in this case, that said Act is unconstitutional; that particularly the provisions of Sections 2-A, 2-B, and 2-D, of said Act are unconstitutional as applied to these plaintiffs-appellant in that said provisions of said Act violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States and violate Article III, Section 1 and 2, of the Constitution of the United States.

5. The Court erred in making the following conclusion of law:

"The case should be dismissed for want of jurisdiction." (Tr. 42)

The foregoing conclusion of law is in error for the same reasons as stated above with respect to the conclusion of law quoted in Specification No. 4.

6. The Court erred in entering judgment dismissing said action for want of jurisdiction. (Tr. 43-44)

The entry of said judgment was in error for the same reason as stated above with respect to the conclusion of law quoted in Specification No. 4.

SUMMARY OF ARGUMENT

I. THE PORTAL-TO-PORTAL ACT HAS NO APPLICATION TO THE FACTS OF THIS CASE.

A. The Portal-to-Portal Act was not intended to apply to cases where, as here, employees were REQUIRED to report at a specified time and place in advance of their regular shifts.

B. The Portal-to-Portal Act has no application in this case for the further reason that if the activities in question were not "preliminaray" or "postliminary" they were compensable under the contract of employment.

C. The Portal-to-Portal Act has no application in this case for the further reason that the contract of employment at hourly rates, with time and one-half for overtime, required that plaintiffs be compensated for the time spent in the activities in controversy, although not paid for in the past.

D. The Portal-to-Portal Act has no application in this case for the final reason that there was an implied, if not express, contract to pay plaintiffs for the activities in controversy.

E. If defendant contends that plaintiffs have been paid in full for all time worked, including the activities in question, then the law requires ad-

ditional one-half time pay for all such time over 40 hours in any week.

II. IF THE PORTAL-TO-PORTAL ACT HAS APPLICATION TO THE FACTS OF THIS CASE, THEN SAID ACT IS UNCONSTITUTIONAL AS APPLIED TO SUCH FACTS.

A. The claims of Plaintiff in this case are not purely statutory rights but are vested property rights, and even if statutory rights are of a compensatory nature and therefore cannot be completely destroyed.

B. Even rights subject to the commerce power are protected by the guaranty of the process of law, which would render the Portal-to-Portal Act unconstitutional as applied to the facts of this case.

C. To withdraw jurisdiction of both state and federal courts to provide any remedy whatever for the claims involved in this case would be to destroy the right of compensation itself and would violate the due process clause of the Fifth Amendment.

D. In this case there can be no validation by the Portal-to-Portal Act of a previously invalid contract not to pay compensation for the activities here involved for the reason that there was no such con-

tract and, on the contrary, it was either expressly or impliedly agreed that plaintiffs would be compensated for such activities.

Pertinent Statutory Provisions

The pertinent provisions of the Portal-to-Portal Act of 1947, (61 Stat., 84; 29 U.S.C.A. sec. 251), are the following:

> "Sec. 2. Relief From Certain Existing Claims Under the Fair Labor Standards Act of 1938, As Amended, the Walsh-Healy Act, and the Bacon-Davis Act.—
> (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
> (1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.
> * * *

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

ARGUMENT

I. THE PORTAL-TO-PORTAL ACT HAS NO APPLICATION TO THE FACTS OF THIS CASE.

A. The Portal-to-Portal Act was not intended to apply to cases where, as here, employees were REQUIRED to report at a specific time in advance of their regular shifts.

It is, of course, a well known fact that the sole reason for passage of the Portal-to-Portal Act was the decision

of the Supreme Court of the United States in *Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680. It thus becomes of importance to analyze that case in order to determine the nature of the problem with which Congress intended to deal. The issue in that case was whether time spent by employees in walking from where they punched the time clocks to their particular places of work and in certain preliminary duties in order to get ready to work was "time worked" for the purposes of overtime compensation under the Fair Labor Standards Act. In the course of the decision we find the following statement.

> "*They were required to be ready for work at their benches at the scheduled starting times.* They were given 14-minute periods in which to punch the time clocks, walk to the places of work and prepare for productive labors. But *there was no requirement that an employee check in or be on the premises at any particular time during that* 14-*minute interval.* As noted by the District Court, there was no evidence 'that if the employee didn't get there by 14 minutes to seven he was fired and there is much testimony to prove that stragglers came in as late as one minute to seven.' 60 F. Supp. at 149. Indeed, it would have been impossible for all members of a particular shift to be checked in at the same time in view of the rate at which the time clocks were punched." (Id. at 689)

The Court went on, however, to hold that *even though employees were not required to report at any specified time in advance of their regular shifts,* their activities of walking from the time clocks to their particular

places of work and their preliminary duties in getting ready to work were nevertheless for the benefit of the employer, rather than for their own convenience, and that if such activities required any substantial time they would be entitled to receive overtime compensation under the Act.

Such was the decision which Congress sought to remedy in the Portal-to-Portal Act and, it is submitted, that the Act was designed solely to remedy the possibility of liability to employers arising from similar situations in which, in view of the *Mt. Clemens* case, they might be held liable for large amounts of back wages and liquidated damages for walking time and other preliminary activities, *even though they had not required their employees to report at any specified time in advance of their regular shifts.* It is futher submitted that in drafting and adopting this Act Congress had no intention of applying its provisions to situations in which employees were *required* to report at a specified time in advance of their regular shifts and, on the contrary, intended that under such situations the Portal-to-Portal Act would not apply, but that employees would be entitled to compensation for such time under the Fair Labor Standards Act.

That such was the intent of Congress in adopting the Portal-to-Portal Act is clear from the following references to its legislative history:

In House Report No. 71, 80th Congress, 1st Session, page 13, reference is made to the "new doctrine" of the *Mt. Clemens* case and the following statement is then made:

> "Following the decision in the Mount Clemens Pottery case, many suits were filed in all parts of the country seeking to recover large amounts claimed to be due *under the formula laid down in that case.*"

In the debate on the Act in the House of Representatives we find the following colloquy between Representative Miller and Representative Walter, relating to Section 3 of the original House bill, section 2 of the present Act:

> "Mr. MILLER of Connecticut. Mr. Chairman, will the gentleman yield?
>
> Mr. WALTER. I yield to the gentleman from Connecticut.
>
> Mr. MILLER of Connecticut. As a layman, I cannot quite understand the language in section 3, (Section 2 of the final Act) particularly the words 'either by custom or practice.' Would that mean that if the custom or practice is admittedly bad or in error that would be a defense?
>
> "MR. WALTER. I was about to come to that. That phase of the problem as contained in section 3 of the bill caused our committee a great deal of trouble. What is custom and practice? What is the custom and practice in determining what the employer has a right to compel employees to do? You will notice that language applies to activities that are heretofore or hereafter engaged in. As to activities heretofore engaged in there can be little question; however, as to what is a custom or practice in a new

business will cause difficulty. Bearing in mind the fact there are about 55,000 new employers a year, of course we can foresee difficulty. But *custom and practice in that connection means a custom and practice not in violation of the law. Certainly no employer could, for example, compel an employee to get to his place of business an hour before he punches the clock and because he had done that for a while relieve himself of his responsibility to comply with the law by saying, 'That is the custom and practice of my business.' No court would uphold any arrangement of that sort. Certainly that is work under any of the definitions of the courts and we have to rely on a common-sense interpretation of that language.''* (Cong. Rec., 80th Cong., 1st Sess., Vol. 93, pp. 1550-1551.)

A similar understanding and intent on the part of the Senate is clear from the colloquy between Senator Pepper and Senator Baldwin, Congressional Record, 80th Congress, 1st Session, p. 2381, as follows:

MR. PEPPER . . . . "in the South, where it is my privilege to live, a new enterprise or a new factory may be established, giving employment to the women of the community. That is certainly a desirable objective. However, too often—if not generally—those women will be told, 'Come here half an hour before the time to go to work and get your machines ready, get your needles threaded, get your materials laid out, or get your patterns fitted. Get everything ready on your time.' "

* * *

"MR. BALDWIN. My learned friend from Florida, for whose ability and oratory I have high respect, has stated a case in Florida in which certain time would not be compensated for. The case is almost on all-fours with the first category. In my

> State of Connecticut there would be no question but that the time would be compensated for. So I submit that my learned friend must get a better case than that."

The same understanding of the purpose and intent of the Portal-to-Portal Act in this respect is reflected by the decisions of the courts. Thus in *Western Union v. McComb,* (CCA 6th) 165 F (2d) 65, an injunction proceeding, the court stated at page 73 with reference to the Act that:

> "The underlying reason for its enactment was to foreclose myriads of suits demanding some six billion dollars as compensation for *'walking time' and the like,* brought in pursuance of the doctrine announced by the Supreme Court in Anderson v. Mt. Clemens Pottery Co., . . ."

Likewise, in *Tricomi* v. *Palumbo Cigar Co.,* (N.Y. Sup. Ct.) 7 W. H. Cas. 879, the court stated that:

> *"The history of the act clearly imparts it was intended to reach demands arising from claimed activities having no direct relation to the business of the employer* either by virtue of custom or contract. Defendants do not assert plaintiff was not engaged in some way as foreman or otherwise in production in their business, but contend that some of the time devoted to their business was beyond the permissible contract period and therefore no contract or custom exists requiring payment for such extended time of service. This is not the kind or nature of activity whose compensation is proscribed."

In this same connection it is to be noted that as early as October 30, 1940 the U. S. Department of Labor is-

sued a bulletin known as "Interpretive Bulletin No. 13", on the subject "Hours Worked", in which the following general rule was stated in paragraph 2 thereof:

> "As a general rule, hours worked will include (1) all time during which an employee is *required* to be on duty or to be on the employer's premises or at a prescribed work place, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so."

It may perhaps be said that the Portal-to-Portal Act limits the proposition that an employee is to be paid for time during which he is suffered or permitted to work when not *required* to do so by the statutory requirement that there must be a contract or custom before such time is compensable. But the idea that working time for the purposes of the Fair Labor Standards Act starts when an employee is required to report at a specified time and place has never been seriously controverted and has been firmly established for many years—long before the *Mt. Clemens* case created the situation sought to be remedied by the Portal-to-Portal Act.

Thus it is crystal clear that Congress did not intend to apply the Act to situations such as those involved in this case in which employees were *required,* under penalty of discharge, to report at the guardhouse for roll call, inspection, assignment of beats, and daily orders, thirty minutes in advance of going on actual patrol duty.

The contrary result urged by defendants in this case would mean that an employer who willfully violated the Fair Labor Standards Act would be in a better position than one who tried to comply, but made an inadvertent mistake. Thus, an employer who attempted to pay overtime to all employees, but overlooked a few employees, would be held liable by the contract and custom established for the others. But an employer who *required* all employees to report half an hour early for work, as in the examples cited by Rep. Walter and Sen. Pepper, and then willfully refused to pay anything for that half-hour would now go free under defendant's position for the reason that there was no custom or contract for payment. That such was not the intent of Congress is clear from the legislative history quoted above, as well as from the fact that a statute so intended to favor willful law violators would be contrary to public policy.

B. The Portal-to-Portal Act has no application in this case for the further reason that if the activities in question were not "preliminary" or "postliminary" they were compensable under the contract of employment.

In this case the court below, on application of defendants, made findings and conclusions that *the activities here in dispute were "preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard; . . ."* (Tr. 40); that the only contract between the parties was "that plaintiffs and

each of them would be compensated and paid for the time spent by them in actually guarding said shipyard, *as distinguished from any preliminary or postliminary activities in connection therewith. . . .*" (Tr. 40); and that there was no express provision of any contract "pursuant to which the preliminary and postliminary activities referred to above and the time spent in performing the same were compensable, . . ." (Tr. 41)

It follows that if the Court erred in holding that the activities in question were "preliminary" or "postliminary" they were compensable under the contract of employment, which admittedly provided compensation for all activities not of a "preliminary" or "postliminary" nature, and that, therefore, such claims are not barred by the Portal-to-Portal Act. As demonstrated below, however, it cannot be said that the activities of guards who are *required* to report thirty minutes each day in advance of going on patrol duty for roll call, inspection, assignment of beats, and orders are "preliminary" or "postliminary" activities. On the contrary, the following authorities demonstrate that such activities must be regarded as "principal" activities of these employees and therefore within the terms of their contract for compensation.

The best analogy—and one bearing directly upon this issue—is the use made by Congress of the terms "pre-

liminary'' and ''postliminary'' activities in Section 4 (a) of the Portal-to-Portal Act as follows:

> ''SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT AND THE BACON-DAVIS ACT.—
>
> ''(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay to employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act.—
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) *activities which are preliminary to or postliminary to said principal activity or activities, which occur* either *prior to the time on any particular workday at which such employee commences,* or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.''

It is recognized that section 4 deals with ''future claims'' and that section 2, on ''existing claims,'' makes no reference to the terms ''preliminary'' and ''postliminary'' activities. It is nevertheless submitted, however, that the meaning of these terms has a controlling influence in this case for two reasons:

(1) That despite the distinction in the Act between "existing" and "future" claims, the legislative history of the Act shows clearly that there was no intention of barring employees from compensation for their "principal" activities within the scheduled work-day, even as to "existing" claims and that the requirements of the Fair Labor Standards Act were not changed in any way in that respect.

(2) That, regardless of the holding of this court as to reason (1), if the activities here in question were not "preliminary" or "postliminary" they were compensable under the contract of employment, under the finding of the Court, in effect, that the company promised to pay for all of the principal activities of the guards, an intent made clear by the phrase "as distinguished from any preliminary or postliminary activities in connection therewith."

We thus turn to the intention with which Congress employed these terms.

In Senate Report No. 48, 80th Congress, 1st Session, p. 48, although under the heading "Future Portal-to-Portal Claims," the following statement appears:

> "It will be observed that the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities marked the beginning and the end of his workday. The term "principal activity or activities" includes all activities which are an integral

part thereof as illustrated by the following examples:

"(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

"(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

* * *

"Any activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act."

In the debate on the Portal-to-Portal Act in the Senate, the following statement was made by Senator Cooper, as quoted in the Congressional Record, 80th Congress, 1st Session, p. 2375:

"Mr. COOPER. Reverting again to future claims, I repeat that *as to the period which we might call the scheduled workday, from the commencement of the principal activity until it is completed, the committee bill does not legislate. Every right that a worker has secured under the Fair Labor Standards Act up to the Mount Clemens decision is preserved to him.* I believe that the distinguished Senator from Rhode Island would agree with the statement I have just made.

"There is one other area in which it could be argued that the committee bill might deprive a worker of some right which he has earned or which has been accorded to him under the Fair Labor Standards Act, and that is in a determination or definition of the words "principal activity." I will give an example. Before the enactment of the Fair Labor Standards Act an employee might have worked upon a lathe under a contract, and his contract may have provided that his pay should commence at a scheduled hour, say at 7 o'clock when the lathe began to run, and he began to apply his energy to a casting or to a clock upon the lathe. After the enactment of the Fair Labor Standards Act, by interpretations of the Wage and Hour Administrator, it was held that certain preparatory activities such as sharpening tools, oiling the machinery, preparing his machinery for work, were so closely related to his productive activity that the employer must compensate the employee for it. We believe that *in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act,* because it is our opinion that *those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity.* And to make our position clear we have given examples in the report."

Further support and clarification for this position appear in an "Interpretation Bulletin" issued November, 1947, by the United States Department of Labor, entitled "General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938." Title 29, Chapter V, Code of Federal Reg-

ulations, Part 790. The Supreme Court of the United States has held that such administrative interpretations, although not binding, are entitled to persuasive weight. *United States v. American Trucking Assn.,* 310 U. S. 534; *Skidmore* v. *Swift & Co.,* 323 U. S. 134. On pages 11 to 13 of this bulletin the following statements appear:

> "Where, however, an employee is *required by his employer to report at a particular hour at his workbench or other place* where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. The difference in the two situations is that in the second *the employee was engaged to wait* while in the first the employee waited to be engaged.
>
> * * *
>
> "(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the 'principal' activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, an time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities' which the employee is employed to perform, it is generally necessary to determine what are such 'principal' activities. The use by Congress of the plural form 'activities' in the statute makes it clear that in order for *an activity to be a 'principal' activity, it need not be predominant in some way over all other activities* engaged in by the employee in performing his job; rather, *an employee may,* for purposes of the Portal-to-Portal

Act, *be engaged in several 'principal' activities* during the workday. The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform';

* * *

"The legislative history further indicates that Congress intended the words 'principal activities' to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered 'sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.'

"(b) *The term 'principal activities' includes all activities which are an integral part of a principal activity.* Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:" (Quoting examples set forth in Senate Report No. 48, set forth above)

* * *

"Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are *those closely related activities which are indispensable to its performance.* If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity."

Clearly, in this case, the activities of plaintiffs in appearing at a specified and required time for roll call, inspection, assignment of beats, and orders of the day were an "integral" part of their duties as guards and were "indispensable" to the performance of such duties. Otherwise how would they know what beat to take or what specific orders of the day to follow in performing their duties as guards? Obviously, the guards could not have performed their patrol duties without these assignments and orders.

As pointed out above, to be a "principal" activity it need not be predominant and there may be several "principal" activities. Here the plaintiffs were not "waiting to be engaged," but were "engaged to wait" and were "employed to perform" the activities in question. Moreover, since plaintiffs were required, under penalty of discharge, to report at a specified time and place each day for these purposes, it must be said that their "workday" began at that time and place. It follows that previously existing provisions of the Fair Labor Standards Act apply to this case and that there was no intent in adopting the Portal-to-Portal Act to change the application of such provisions in a case such as this.

This conclusion is corroborated by the recent publication "The Portal to Portal Act of 1947", Bureau of

National Affairs, 1947, p. 39, as follows:

> "*One preliminary activity which has led to considerable litigation recently is standing roll call and receiving instructions in the case of plant guards.* Several courts have ruled that such time must be included in overtime computations under the Wage-Hour Law. (Bartlett v. General Motors Corp., 6 Wage and Hour Cases 699; Yellow Truck & Coach Mfg. Co. v. Edmondson, 6 Wage and Hour Cases 56; Blazier v. Western Pipe & Steel Co., 6 Wage and Hour Cases 636). *It would appear that such activities of plant guards might continue to be compensable under the Portal-Pay Act as part of their 'principal activity.'*"

One of these cases, the *Blazier* case, was decided by Judge Yankwich and is otherwise referred to as Case No. 5727-Y, D.C., S. D. Cal. The *Bartlett* case is unreported officially, but was decided by Judge Koscinski, Case No. 4802, (D.C.E.D. Mich.). The *Yellow Truck* case by the Circuit Court of Appeals, Sixth Circuit, is reported in 155 F (2d) 367, and states that the appellant conceded, "as indeed it must, that such time spent by guards was working time for the purposes of the Fair Labor Standards Act." These decisions, as well as the early position taken in 1940 by the U. S. Department of Labor that all time that an employee is required to be on duty or at a prescribed place is to be included as working time further supports the conclusion that Congress, in adopting the Portal-to-Portal Act, never intended to change this well established rule and practice.

But even assuming a contrary intent by Congress, which plaintiffs strongly deny, since the contract of employment in this case was, in effect, to pay for the principal activities of the plaintiffs, *as distinguished from any preliminary or postliminary activities in connection therewith,"* it follows that since these activities were not "preliminary or postliminary," they were compensable under the contract of employment in this case.

C. The Portal-to-Portal Act has no application in this case for the further reason that the contract of employment at hourly rates, with time and one-half for overtime, required that plaintiffs be compensated for the time spent in the activities in controversy, although not paid for in the past.

It is important to bear in mind in this case that while plaintiffs were not organized and had no written collective bargaining agreement, (Tr. 87) they were paid at hourly rates, with time and one-half for work in excess of eight hours per day or forty hours per week. (Tr. 76-77) They had not, however, been paid for the thirty minutes each day spent in roll call, inspection, assignment of beats and orders of the day, (Tr. 78) although they were required, under penalty of discharge, to be present during that time and for those purposes.

The question is thus presented whether, under these circumstances and under the facts of this case, the em-

ployment contract, being one for employment at hourly rates, with time and one-half for overtime, requires compensation for the time spent in these activities, despite the fact that no such compensation had been paid in the past.

We therefore respectfully direct the attention of this Court to the recent decision by Judge Yankwich in the case of *Devine* v. *Joshua Hendy Corp.,* April 30, 1948, No. 6176-Y (D.C.S.D. Calif.) 7 W.H. Cas. 936. That case involved a claim for back wages by so-called "leadmen" and foremen employed under a contract providing for hourly rates, with time and one-half for overtime. No payment had been made for time spent in advance of their regular shifts in consulting with foremen on the previous shifts and in laying out work for their crews. The Court stated that:

> "It is true that there was no direct promise to pay. But the contract with the union implies a promise to pay for all work that is required to be done, either before or after the regular eight-hour period." (Id., p. 945)

Accordingly, recovery was allowed.

Attention is likewise directed to the recent case of *Frank* v. *Wilson & Co., Inc.,* 14 C.C.H. Labor Cases, Par. 64, 296, (N.D. Ill., 1948) in which Judge Igoe had a similar claim before him under a contract of employment at

hourly rates, with time and one-half for overtime. In that case the employees were employed in the defendant's mechanical division with scheduled working hours of 8 A. M. to 12 Noon, and from 12:30 P. M. to 4:30 P. M. The defendant required all employees to be dressed in working clothes prior to punching the time clock, and to punch the clock before commencing work. A rule of the defendant required the employees to be dressed and ready to go to work at 7:55 A. M., five minutes before the start of the shift. They were paid only for the time following 8 A. M. The employment contract provided, as did the one here, for a basic workday of eight hours, and a basic work-week of forty hours, and that all time worked in excess of those hours would be paid for at the rate of time and one-half. The court held that the five minutes during which the employees were required to be at their place of employment before their shift started were compensable within the meaning of the Portal Act by the terms of the written contract between the parties, and also by virtue of custom and practice, although the employees had never been paid for that time.

See also *Marchant* v. *Sands Taylor & Wood Co.*, 75 F. Supp. 783, 787, in which a similar result was reached for employees paid on a weekly salary.

The plaintiffs in this case were employed at hourly rates. This, in itself, is an agreement to pay such rates

for each hour or part of an hour spent by the employees in duties for which they were engaged. This agreement, coupled with the express written instructions and orders by defendant Kaiser Company to report for work at a specified time and place was, we submit, an agreement of the type contemplated by Section 2 of the Act to compensate plaintiffs at such hourly rates for all time spent by plaintiffs thereafter until the end of their respective shifts.

What defendants would ask the Court to hold is that before an employer would be liable for an existing claim on a theory of contract to pay he must have, in his contract with his employees, specified each type of overtime work that was to be paid for and that this failure to do so would relieve him from all existing claims for overtime compensation based on the contract of employment, even though the employer *required* his employees to engage in such unspecified activities. Surely nothing could be more removed from the realities of the industrial world. As this Court well knows, virtually the only common type of contract which provides for overtime compensation is the type that specifies an hourly rate, with time and one-half for all overtime work, without specification of each possible type of overtime work. Surely, then, such a contract must satisfy the requirements of Section 2 of the Act. It follows that since the claims of

this case were compensable under such a contract they are not barred by Section 2 of the Portal-to-Portal Act.

D. The Portal-to-Portal Act has no application in this case for the final reason that there was an implied, if not express, contract to pay for the activities in controversy.

While fully recognizing the reference in Section 2 of the Portal-to-Portal Act to the term "express provision" of a contract, we respectfully direct attention to the recent decision of Judge Duncan in *Conwell* v. *Central Mo. Tel. Co.* (W.D. Mo. W.D.) 74 F. Supp. 542. In that case the plaintiffs were two night telephone operators working on eleven-hour night shifts, receiving pay for eight hours (later nine and one-half), the balance being designated as sleeping time. The switchboards were busiest in the first half of the shift, tapering off toward morning. Sometimes the plaintiffs had two or three hours without interruption during which they slept. Other times they were disturbed too frequently to sleep. They could not leave their posts and had to attend to whatever calls came in. The practice of not paying for the three hours designated as sleeping time had continued for about twenty years. The court gave judgment for all of the unpaid "sleeping time". In reaching this decision the Court stated at pages 544-545:

> "If defendant is correct as to the legislative intent, then no person other than the organized groups whose compensation and working hours and con-

ditions are fixed by working agreements would be able to enforce his right to overtime pay for time actually and legitimately earned under the Fair Labor Standards Act prior to the passage of the Portal-to-Portal Act."

* * *

"Senator Ferguson, a member of the Judiciary Committee, who actively participated in the preparation and passage of the Portal-to-Portal Act, in discussing the extent to which the proposed bill destroyed existing causes of action, used the following language:

" 'I answer by saying that it is the intent of the section referred to abolish every known claim that could exist under the Fair Labor Standards Act (29 U.S.C.A. Sec. 201 et seq.) the Walsh-Healey Act (41 U.S.C.A. Sec. 35 et seq.) or the Bacon-Davis Act (40 U.S.C.A. Sec. 276a et seq.)—specifically under the acts and by virtue of nothing else than the acts, except claims which may arise under any express *or implied* contract. It wipes out all claims that are specifically provided for in the acts referred to. I think it was the intention of the draftees of the legislation to wipe out everything under those acts that was not based upon contract or custom or practice. That was the intention.'

"This statement seems to agree with the statements of most other Senators who discussed the matter. It would, therefore, seem that it was the intention of the Congress to wipe out every existing claim except those that had arisen under contract written or unwritten, *express or implied,* or pursuant to custom or practice.

"It must be observed, however, that the Senator used the expression or the phrase *'express or implied contract.'* Senator Ferguson is recognized as a profound lawyer. He was an outstanding judge prior to his election to the United States Senate. I am sure his words were not used lightly and without

> consideration. It is difficult to conclude that the Congress of the United States intended to deny jurisdiction of the Court over legitimate claims of employees who had actually worked many hours in excess of 40 hours permitted by the Fair Labor Standards Act. Nowhere was it insisted during the consideration of the Act that such claims were unfair or unjust or outside the scope of the Fair Labor Standards Act, nor were there any expressions indicating a desire to destroy any such claims, or the jurisdiction of the Court with respect thereto except insofar as it was necessary to deny jurisdiction with respect to the portal-to-portal pay cases which were not seeking compensation for actual services rendered for productive labor, but for traveling and waiting time and for other activities outside actual productive activities."

The general law and the law of Oregon (which governs the contract in this case) is well stated in *Roberts* v. *Gerlinger,* 124 Or. 461, 467, as follows:

> "Where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the person for whom the service is performed expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the service is implied: 6 R.C.L., p. 587, Sec. 6."

To the same effect, as stated in *Le Mieux Bros.* v. *Tremont Lbr. Co.*, 140 F (2d) 387 (CCA 5th), at page 389:

> "It is the universal rule in States having a common-law background that where one renders services to another at the request of the latter there arises an implied contract to pay the servant the reasonable

> value of those services. An implied contract is as binding as an expressed contract, and has as its origin, or base, the agreement between the parties. The law operates on the agreement as distinguished from becoming a part of the agreement."

See also *Page on Contracts,* Vol. 3, (2d Ed.), Sec. 1442, as follows:

> "If the services are rendered at the request of the person for whom they are rendered *or if the benefits thereof are accepted voluntarily by such person* there is an implied promise on his part to make reasonable compensation therefor if no express contract has been made; if the services are such as are ordinarily paid for and if the party who rendered them was not bound to render them without compensation."

It is likewise established law that recovery may be had on the basis of implied contract for extra work or services outside the contract, but performed in connection therewith, when rendered at the expressed or implied request of the other party and when performed with his knowledge and consent. 17 *C.J.S. Contracts,* Sec. 364; 13 *C.J. Contracts,* sec. 588, p. 585.

In this case, of course, it was both with the knowledge and request of defendant Kaiser Company that plaintiffs reported thirty minutes in advance of their patrol duty for roll call, inspection, assignment of beats and orders. Clearly these services were of a useful nature to

the company or it would not have required them, under penalty of discharge. It is equally clear that these services were of a character usually charged for, since both under the Fair Labor Standards Act since the release of Interpretative Bulletin No. 13, *supra,* and by general industrial practice, where an employee is *required* to report at a specified time and place on his employer's premises, all time spent and services performed by him thereafter are usually regarded as time worked, to be charged and paid for. At least plaintiffs were not bound to render these services without compensation. Thus the requirements of the *Roberts* and *Le Mieux* cases are clearly satisfied, as well as the requirements specified by *Page on Contracts,* supra.

Furthermore, if defendants should maintain their position that the contract of employment in this case contemplated payment only for actual guard duties, and not for the activities in question, then these activities constituted extra work outside the contract, but performed in connection therewith at the express request of the employer and with his knowledge and consent, with the result that plaintiffs are entitled to recover for these activities on the basis of implied contract, under the above quoted rules.

Finally, if, on the contrary, defendants should take the position, as previously contended herein by plain-

tiffs, that the contract of employment in this case was for payment solely for the principal activities of the plaintiffs, as distinguished from preliminary or post-liminary activities, then the activities in question, being principal activities, as demonstrated above, are compensable by express contract, with the result that these claims are not barred by section 2 of the Portal-to-Portal Act.

E. If Defendant contends that Plaintiffs havebeen paid in full for all time worked, including the activities in question, then the law requires additional one-half time pay for all such time over forty hours in any week.

If the Court should reject plaintiff's contention that they have been paid nothing for the time in question, and if, as appears to be the case, defendants should take the position that wages already paid to plaintiffs fully compensated them for all time worked, including the time spent in the activities in question, there would still be an issue whether they have been paid for such activities not only straight time rates, but also additional half time as the overtime compensation required under the Fair Labor Standards Act.

To illustrate: X employee worked eight hours each day for six days a week on patrol duty—or a total of 48

hours. He also spent 30 minutes each day in reporting for roll call, inspection, assignment of beats, orders of the day—or three additional hours, making a total of 51 hours. He was paid $52.00 per week, computed at $1.00 per hour for 40 hours and $1.50 per hour for eight hours of overtime.

If defendant should now contend that the $52.00 paid for the week also included payment for all 51 hours of work, then it would follow that although the employee had been paid additional overtime compensation for the first eight hours in excess of 40 hours per week, as required by the Fair Labor Standards Act, he has been paid only at straight time, but not at time and one-half, for the additional three hours spent in the activities here in controversy.

Since, therefore, under such a contention, there would have been at least a custom, if not a contract, to pay for these three hours at straight time, section 2 of the Portal-to-Portal Act would not relieve the employer from liability and the usual requirements of the Fair Labor Standards Act would remain applicable. Under these requirements the employer would be liable to pay an additional one-half time for these three hours whenever they resulted in work in excess of 40 hours in any week.

The formula for computing the additional payment would be as follows—using the example cited above: If X had been paid $48.00 straight time pay for 51 hours' work, his hourly rate would be $.94 per hour. He would then be entitled to additional one-half time pay at $.47 per hour for the 12 hours in excess of 40 hours in the week or a total of $5.64. He has already been paid $4.00 as overtime compensation for eight hours in excess of 40 hours in the week. Thus, he would still be entitled to receive the difference of $1.64 for the week as the additional overtime compensation not yet paid for the three hours in question.

It is, of course, the position of plaintiffs that they have been paid *nothing* whatever for the activities in question and are entitled to full payment at time and one-half for that time—or, to use the example above, to be paid for three hours at $1.50 per hour, making a total of $4.50 additional pay due for the week. But if the Court should reject this contention it would appear that plaintiffs would at least be entitled to be paid additional one-half time pay for the three hours spent each week in the activities in question for the reason that it appears to be defendant's position that plaintiffs have already been paid for the time spent in these activities. But such payment was, at the most, at only straight time rates.

II. IF THE PORTAL-TO-PORTAL ACT HAS APPLICATION TO THE FACTS OF THIS CASE, THEN SAID ACT IS UNCONSTITUTIONAL AS APPLIED TO SUCH FACTS.

It must be conceded, of course, that most of the courts which have passed upon the question have upheld the constitutionality of the Portal-to-Portal Act *as applied to the facts involved in those cases.* These decisions have, in the main, been based upon four principal grounds:

(a) That claims for overtime compensation are not vested property rights, but are statutory rights which can be destroyed at the pleasure of Congress without constitutional inhibitions;

(b) That even if such claims constitute vested property rights, such rights are subject to the power of Congress to limit or destroy under its power to regulate interstate commerce;

(c) That the jurisdiction of the federal district courts is wholly statutory and may thus be withdrawn completely, thus removing the means for enforcement of such claims without constitutional inhibitions; and

(d) That the Act does no more than to validate contracts which may have been illegal when made, which is within the constitutional power of Congress.

It must be further conceded that if any one of these grounds as applied to the facts of this case is valid, then the Act is constitutional. It is the position of appellants, however, not only that the prohibitions of the Act do not apply to the facts of this case, for the reasons stated above, but that, if so applicable, then the Act is unconstitutional insofar as it is applied to the facts of this case. In support of this position appellants contend, as stated below in more detail, that the more recent and better reasoned decisions on the constitutionality of this Act make it clear that each of the four grounds stated above is either too broadly stated or is subject to qualifications which are peculiarly applicable to the facts of this case.

A. The claims of Plaintiffs in this case are not purely statutory rights but are vested property rights, and even if statutory rights cannot be completely destroyed.

Despite decisions to the contrary, it is submitted that the correct view as to the nature of claims for overtime compensation under the Fair Labor Standards Act is that expressed in a recent and most scholarly discussion of this subject by Judge Driver in *Miller* v. *Howe Sound Mining Co.,* (E. D. Wash.) decided May 11, 1948, and as yet not officially reported, but to be found in 8 W. H. Cas. 1. In that case Judge Driver, after quoting many decisions to support his position, held as follows on this point:

> ". . . plaintiff's claims to overtime pay, although arising out of the Fair Labor Standards Act, are compensatory and quasi-contractural, vested property rights, such as would usually be within the protection of the due process clause."

To a similar effect see the comprehensive analysis of this Act in "Constitutionality of the Portal-to-Portal Act", 47 *Col. L. Rev.* 1010, at 1015 and 1021. To the same effect see *Fletcher* v. *Grinnell Bros.,* 64 F. Supp. 778, 780; *Reid* v. *Solar Corp.,* 69 F. Supp. 626, 637. This, of course, is in accord with the general proposition that a vested statutory cause of action is property. *Pritchard* v. *Norton,* 106 U. S. 124, 132; *United States* v. *Standard Oil Co. of Calif.,* 21 F. Supp. 645, 661; aff'd 107 F. (2d) 402 (CCA 9th); c. d. 84 L. ed. 1003, 1019.

But even if, as held by some courts, such claims are wholly statutory, it does not follow, as some cases have held, that Congress may with impunity destroy such rights by retroactive legislation. Thus, as pointed out in 47 *Col. L. Rev.* 1010, at 1013:

> "It has been argued that the due process clause does not protect against retroactive destruction of rights created by statute since they are not vested. But the decisions fail to support the distinction between statutory rights and vested rights since legislation retroactively eradicating statutory causes of action has been both upheld and invalidated under the 14th Amendment. An analysis of the cases dealing with such legislation reveals that the nature of the claim, rather than the fact that it was statutory, has been the determinative factor."

This article then discusses the cases on the subject and reaches the conclusion that when statutory liability has been imposed for *compensatory* purposes retroactive laws have been held invalid and that claims for overtime compensation under the Fair Labor Standards Act are compensatory in nature. (Id. 1014, 1015) To the same effect see "The Portal-to-Portal Act of 1947", 34 Va. L. Rev. 26 at 35-36 and 53.

That claims under the Fair Labor Standards Act are compensatory in nature is firmly established by the case of *Overnight Motor Transp. Co.* v. *Missel,* 316 U. S. 572, 583. Decisions holding other rights based on statutes to be compensatory and therefore immune from retroactive legislation include: *Ettor* v. *Tacoma,* 228 U. S. 148; *Coombes* v. *Getz,* 285 U. S. 434 and *Steamship Co.* v. *Jolliffe,* 2 Wall. 450; 17 L. Ed. 805.

Consider now the nature of the claims in this case. These are not claims for compensation for time spent in walking to work or in other activities of a purely "preliminary" or "postliminary" nature, as those terms have been defined, as discussed above. In such cases the employees were not requested or required to report at any given time and place and such activities were all engaged in *before* the time when they were required to report for work. It is thus understandable why some courts have held that claims for such activities are "wholly

statutory'' and not compensatory in nature, although appellants do not agree with the soundness of such decisions.

In this case, however, plaintiffs were *required* to report at a given time and place. All of the activities in question were performed *after* that time. These activities were not of a ''preliminary'' or ''postliminary'' nature, but were among the ''principal'' activities of the plaintiffs, because indispensable to the performance of their patrol activities. Finally, there was a liability on the basis of implied contract for such activities, since performed at the request of the employer, even if it be held that an implied contract does not satisfy the requirements of Section 2 of the Act.

Therefore, it is submitted that under these circumstances claims for compensation for such work constitute vested contractural or property rights which are protected from retroactive destruction by statute and that even if such claims be regarded as constituting no more than a statutory right, which appellants strongly deny, the claims under these circumstances must clearly be regarded as compensatory in nature and that their destruction by retroactive legislation is therefore prohibited.

B. Even rights subject to the commerce power are protected by the guaranty of due process of law, which would render the Portal-to-Portal Act as unconstitutional if applied to the facts of this case.

Several decisions in upholding the constitutionality of the Portal-to-Portal Act have inferred that since the statute is an exercise of the commerce power, even vested contract or property rights can be destroyed retroactively with impunity. In the only circuit court decision to pass directly on this question, however, it was held by Judge Parker in *Seese* v. *Bethlehem Steel Co.* (CCA 4th) decided May 5, 1948, and still unreported officially, although reported in 7 W. H. Cas. 989, that even the exercise of the commerce power is subject to the guarantee of due process of law and that

> "Not even in the exercise of the commerce power may Congress take one man's property and give it to another or arbitrarily strike down rights arising under contract, . . ."

The decision went on to hold, however, that claims for time spent in changing clothes and walking to work *before the time required to report for work* might be taken away by Congress without violation of due process of law.

Likewise, Judge Driver in *Miller* v. *Howe Sound Mining Co.,* supra, held that the commerce clause is subject to the guarantee of due process in the Fifth Amend-

ment, that the only remaining question was whether the Act was unreasonable, arbitrary and capricious, and that plaintiff had the burden of proving such to be the case. In that decision, however, the exact nature of the activities involved did not appear and the sole question was the validity of the complaint.

To the same effect, see 47 *Col. L. Rev.* 1010, supra, at 1017-1018, citing many cases:

> "It has been suggested that property rights, despite the usual protection of the Fifth Amendment, may be eradicated by an exercise of the Congressional power to regulate interstate commerce. This suggestion is based upon an interpretation of statements often made by the Court in sustaining statutes enacted under the interstate commerce power. Such an interpretation is not only contrary to the highest judicial opinion, but also is repugnant to the most basic constitutional principle—that laws enacted pursuant to one of the powers conferred on the federal government must conform to the inhibitions of other clauses of the Constitution. An examination of the cases in which such statements have usually appeared reveals that the legislation involved merely restricted the prospective 'freedom of contract' of the individual affected. In other instances, the statute prevented the completion of an executory contract, or altered the organizational form of an economic relationship. When an accrued cause of action has been at stake, the statute merely postponed the time for prosecution of the claim or withdrew but one of several remedies for its enforcement. In no situation, however, did the Court completely deny relief to one whose underlying cause of action had accrued. Examined in this light, the dicta seem only to restate in another form the

> familiar proposition that, when Congress has power to legislate on a certain subject, the validity of the statute under the due process clause will depend upon its reasonableness."

And, later, at pages 1020-1021:

> "In the light of these facts, the final question is whether the legislation is in the realm of arbitrary action or within the limits of Congressional discretion. The answer to this question depends upon the Court's determination of whether the economic, political, and social consequences inherent in the deprivation of employees' claims for accrued compensation outweigh by far the beneficial effects of relieving employers from liability. The Portal-to-Portal Act has answered this question in the negative, and, in the past decade, the Congressional solution to economic questions has been accepted. However, the very novelty of the legislation may affect its validity. This is probably the most outright instance in which potential property has been taken from one specific class, employees, and has been given by the legislature to another, their employers. Whereas a statute is not necessarily deemed arbitrary because it incidentally works a hardship on one group while benefiting another, the previous limits of Congressional power to effect such a result for economic reasons may well have been surpassed by the tremendous consequences accomplished by this Act."

Therefore, one of the important questions before this Court is whether the Portal-to-Portal Act, if applied to bar claims for the activities involved in this case, would be unreasonable, arbitrary and capricious, and therefore unconstitutional *insofar as applicable to the facts of this case.*

Here again it is important to bear in mind that this is not the usual "portal-to-portal" type of case involving walking time or other activities before the time at which employees were required to report for work. The great bulk of the cases sought to be outlawed by the Portal-to-Portal Act and which were regarded as involving "windfalls" to employees under the *Mt. Clemens* decision were clearly of that character and even the economic aspects of those cases has been exaggerated. 47 *Col. L. Rev.* 1010, supra, at 1020. As to such cases, however, it may be assumed with some plausibility that the action of Congress was not unreasonable, arbitrary or capricious.

This case, however, involves a claim for *activities following the time when plaintiffs were required by written orders to report at a specified place*—thereby falling within the definition of "time worked" at least since the issuance of Interpretative Bulletin No.13, supra, in 1940. The case was filed on January 17, 1948, months before the decision in the *Mt. Clemens* case, on June 10, 1946. The activities involved are among the principal activities of the employees, as heretofore demonstrated and as distinguished from "preliminary" or "postliminary" activities, as were involved in most of the "portal-to-portal" cases. In any event, there was an implied contract to pay for these activities, based on express request of the employer, and even if such an implied contract does not satisfy the terms of the Portal-

to-Portal Act, it creates an obligation which cannot be destroyed retroactively under the due process clause.

It is therefore submitted that even if the language of Section 2 of the Portal-to-Portal Act be interpreted as broad enough to foreclose existing claims for compensation for such activities, which appellants' strongly deny, it would be wholly unreasonable, arbitrary and capricious to bar retroactively all existing claims for compensation for such activities where facts and circumstances exist such as are presented in this case. It follows that the Act must either be construed in a way so as to avoid unconstitutionality, i. e., as not applicable to the facts of this case, or else must be held unconstitutional insofar as it applies to such facts.

C. To withdraw jurisdiction of both state and federal courts to grant compensation for the activities involved in this case would be to destroy the right of compensation itself and would violate the due process clause of the Fifth Amendment.

Despite decisions to the contrary, it is respectfully submitted that the sound rule on the question of withdrawal of jurisdiction from the courts over such cases is that stated by Judge Driver in *Miller* v. *Howe Sound Mining Co.,* supra, as follows, after citation of authorities:

> "It is my conclusion that Congress can not destroy constitutionally protected property rights by the

> expedient of withdrawing jurisdiction from every Court in which suits for their enforcement could be brought."

He therefore concludes that the validity of the Act depends upon whether Congress by section 2 (a) of the Act can *directly* relieve employers from liability for such claims.

The same view is expressed in 47 *Col. L. Rev.,* 1010, supra, at 1021-1025, in which it is pointed out that *in previous decisions involving other statutes there was not a total destruction of all remedies whatever, in both state and federal courts.* It is there stated, at pages 1023-1024, in part:

> "The Supreme Court has recognized the fact that the state legislature may make changes in the procedure a party must follow to enforce his right. But it has held that 'a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy . . . .' That there exists a similar limitation on Congressional action has also been enunciated. Moreover, in instances where substantial remedial changes have been effected, the Court has been careful to point out that, had the right itself been diminished, a due process question would have been presented. It cannot be expected that the Court, which has so often in recent years discarded conceptualistic arguments in resolving important issues, will fail to recognize that it is a right rather than a remedy that is nullified by the Portal-to-Portal Act. Thus there is presented no problem different from that involved when a direct attempt to relieve employers from accrued statutory liability is made."

and later, after discussing the various cases,

> "If an analysis of all the cases concerning withdrawal of jurisdiction reveals anything at all, it is that a novel experiment has been attempted in the Portal-to-Portal Act, and what few precedents can be amassed are unfavorably disposed to its validity."

An even broader objection is expressed in 34 *Va. L. Rev.* 26, supra, at 50-52, in contending that by removal of jurisdiction from the courts Congress "has assailed the one dangerous chink in the Fifth Amendment's armor and thereby is guilty of a reprehensible lack of self-restraint." Although conceding that the technique is effective, this article continues at page 52:

> ". . . its use is certainly to be condemned and falls within the opprobium attached to attempts to pack the Supreme Court. No less objectionable than those endeavors to upset the separation of powers is this present day tampering with the jurisdiction of the courts to avoid constitutional questions and a face to face conflict with substantive questions . . . . A strong argument can be made out against permitting the use of this device on the ground that congressional authority is both created and conditioned by the Constitution and that, while Congress has the power to limit the jurisdiction of the courts, it may not exercise the power if the effect is to violate the 5th Amendment."

and, later, that this technique

> "must be confined lest the independence of the courts be subjected to the rise and fall of the tides of public opinion. The passions of the hour must not

be permitted to evade constitutional safeguards by detour."

It is interesting to compare the comments of the learned trial judge in this case, (Tr. 93) although his conclusions, which were based on an earlier decision in *Boehle* v. *Electro Metallurgical Co.*, 72 F. Supp. 21, have been criticized in their failure to appreciate that the legislation involved in previous decisions on this question did not wholly destroy all available remedies. 47 *Col. L. Rev.* 1010, supra, at 1025.

In other words ,the guarantee of due process applies to the exercise by Congress of all its powers, including its power to remove jurisdiction from the courts as well as its power over commerce. Therefore, as indicated in the *Miller* case, supra, and in 47 *Col. L. Rev.* 1010, supra, the real question on this issue is whether Congress could directly relieve employers from liability for such claims and thereby destroy the rights themselves. This, of course, involves the question of whether such a course of action is a valid exercise of the commerce power, or whether in the facts of this particular case, such an attempted exercise of this power would be unreasonable, arbitrary and capricious and would thereby violate the guarantee of due process of law. This question has been discussed above and it should require no repetition to demonstrate the unreasonable, arbitrary and capric-

ious effect of denying all relief to the plaintiffs under the facts of this case.

D. In this case there can be no validation by the Portal-to-Portal Act of a previously invalid contract not to pay compensation for the activities here involved for the reason that there was no such contract and, on the contrary, it was either expressly or impliedly agreed that plaintiffs would be compensated for such activities.

In *Seese* v. *Bethlehem Steel Co.,* supra, it was suggested that all Congress did in the Portal-to-Portal Act was to validate agreements between employers and employees which were invalid under the Fair Labor Standards Act *by reason of its interpretation by the Supreme Court* of the United States and that Congress has power to validate retroactively contracts which were illegal when made. Cf. *Bateman* v. *Ford Motor Co.,* 76 F. S. 178, also referring to legalizing understandings which employers and employees had before the *Mt. Clemens* decision.

Such an argument may have some plausibility when applied to cases in which employees had engaged for a long period without additional pay in walking time and other similar activities *prior to the time when they were required to report for work.* It is clear, however, that such an argument can have no application to the facts of this particular case for at least three reasons:

(1) This is not a case in which the contract of employment was illegal because of interpretation of the Fair Labor Standards Act by the Supreme Court of the United States. Here, on the contrary, even if there was an agreement not to pay for the activities in question, which plaintiffs strongly deny for reasons appearing below, any such agreement was clearly illegal not solely by reason of decisions of the Supreme Court giving rise to the Portal-to-Portal Act, but on its very face, since the employees were *required* in writing to report at a given time and place, which clearly required payment for all subsequent activities by virtue of the base provisions of the Fair Labor Standards Act without necessity for judicial interpretation.

(2) In this case the contract of employment was for payment on an hourly basis, with time and one-half for overtime. It also provided for payment of all activities other than those of a "preliminary" or "postliminary" nature, and the activities in question were not of that nature, but, on the contrary, were among the "principal" activities of plaintiffs, all as demonstrated above. It follows that there was in this case no invalid contract not to pay for the activities in question to be validated by the Portal-to-Portal Act, as necessary under this theory of the case. Rather there was a valid contract which by its own terms required payment for these activities.

(3) Even if it be held that there was no such express contract as contended by plaintiffs, it is nevertheless true that the fact that the employer *required in writing* that plaintiffs report at a given time and place for roll call, inspection, assignment of beats and orders of the day is sufficient to *imply* a contract to pay for such activities, as demonstrated above, and even though such an implied contract be held insufficient to satisfy section 2 of the Portal-to-Portal Act, despite the authorities and arguments set forth above, an implied agreement at least is sufficient to negative any inference that there was an agreement *not* to pay for these activities, as necessary to sustain the constitutionality of the Act as applied to the facts of this case on the theory of validating a previously invalid contract.

CONCLUSION

Without repeating the summary of arguments which appears above, it is submitted that these arguments and the authorities in support of them have demonstrated that the prohibitions of section 2 of the Portal-to-Portal Act were not intended to and have no application to the peculiar facts of this particular case, which is not a "portal-to-portal" case in any true sense of the word, and that if the Act be construed as barring the claims of

this case then the Act is unconstitutional and void insofar as it applies to the facts of this case.

Respectfully submitted,
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